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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WONG'S RESTAURANT EQUIPMENT, Plaintiff and Appellant, v. RAMON MALDONADO, Defendant and Respondent.	B207860 (Los Angeles County Super. Ct. No. GC037252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jan A. Pluim, Judge. Affirmed.

Law Office of Thomas A. Vesey and Thomas A. Vesey for Plaintiff and Appellant.

Law Offices of Stanley P. Lieber and Stanley P. Lieber for Defendant and Respondent.

Plaintiff and appellant Wong's Restaurant Equipment (Wong) appeals a judgment in favor of defendant and respondent Ramon Maldonado (Maldonado) following a court trial.

The essential issue presented is whether the trial court erred in denying Wong's motion for new trial on the grounds of accident and surprise and newly discovered evidence.[1]

We perceive no error in the denial of the new trial motion. Therefore, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Events preceding the instant action.*

In 1995, Wong installed kitchen equipment in the Brave Bull restaurant in San Gabriel. Maldonado and Alfred Balderrama (Balderrama) were the owners of the restaurant.

In 2001, Balderrama filed a chapter 7 bankruptcy petition, listing Wong as a creditor holding an unsecured $250,000 claim.

In 2002, Wong filed a breach of contract action against Maldonado, seeking to recover $124,746.00 unpaid on the contract. The case was settled. In December 2002, a stipulated judgment for $150,000 was entered in favor of Wong. The stipulated judgment was not paid.

In 2003, during an examination of debtor Maldonado, Wong learned that in 1998, Maldonado had transferred all his assets to a family limited partnership.

2. *The instant action.*

a. *Pleadings.*

In 2006, Wong commenced the instant action, seeking to set aside Maldonado's 1998 transfer of his assets to the Maldonado Family Limited Partnership. Wong alleged

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[1] An order denying a motion for new trial is not directly appealable, but is reviewable on an appeal from the judgment. (*Hamasaki v. Flotho* (1952) 39 Cal.2d 602, 608.) Therefore, Wong's contentions relating to the denial of the motion for new trial are properly before this court.

Maldonado transferred his assets to the family limited partnership for no consideration and "*to hinder, delay or defraud the collection of plaintiff's judgment.*" (Italics added.)

b. *Court trial results in judgment for Maldonado; trial court determined Maldonado was not insolvent at the time he transferred his assets to the family limited partnership.*[2]

On July 9, 2007, the matter came on for a court trial. The trial court heard testimony from John Wong, the owner of Wong's Restaurant Equipment, and from Maldonado.

Maldonado testified, inter alia, he formed the family limited partnership in 1998 "[b]ecause I was advised to avoid probat[e] when I pass away." In 1998, he and Balderrama, who were business partners, entered into an agreement to split up their various interests. Maldonado became the sole owner of their M.P.R. auto repair business as well as four pieces of real property; Balderrama kept the Brave Bull; and they sold M.P.R. Fleet Services, Inc. for $3.5 million.

According to Maldonado, the Brave Bull restaurant was worth about $4.5 million at the time they dissolved their partnership in 1998, with liabilities of about $2 million, for a net worth of about $2.5 million. Maldonado based his valuation of the Brave Bull on a June 1999 agreement by Balderrama to sell the restaurant to one John Huiskes for $4.5 million. (The buy/sell agreement, exhibit 14, was not admitted into evidence.)

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[2] Civil Code section 3439.04, within the Uniform Fraudulent Transfer Act (§ 3439 et seq.) states in relevant part: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) *With actual intent to hinder, delay, or defraud any creditor of the debtor*. [¶] . . . [¶] (b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following: [¶] . . . [¶] (9) *Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred*." (Italics added.)

A debtor is "insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets." (§ 3439.02, subd. (a).)

All further statutory references are to the Civil Code, unless otherwise specified.

Maldonado further testified the sale to Huiskes was not consummated. Maldonado added that he was not involved in that transaction because "we were dissolving, and I was taking care of the auto repair, and he was taking care of the Brave Bull."

In closing argument, Wong's counsel asserted Maldonado was insolvent in 1998 based on the $124,000 debt owed to Wong as well as a $749,000 SBA loan for which Maldonado and Balderrama were liable. Those liabilities, totaling $873,000, exceeded Maldonado's $555,000 equity in three properties.

The trial court questioned why the SBA loan would be included in any debts, in that the SBA debt was allocated to Balderrama after they divided their assets in 1998.

Maldonado's counsel argued "he's trying to have it both ways. He's trying to say, well, you have the debts, but you don't have the assets . . . ." Therefore, "the assets of the Brave Bull have to be considered."

After taking the matter under submission, the trial court issued a minute order stating: "The Court finds [Maldonado's] assets were greater than his liabilities in September 1998 when the family partnership was created and founded. The family partnership [was] established at the direction of a lawyer for estate planning purposes. The Court finds that [Maldonado] did not make a fraudulent transfer of assets in September 1998, through the family partnership, to avoid creditors, potential creditors, and/or future judgments against him. [¶] Judgment is therefore awarded to defendant Ramon Maldonado and against plaintiff Wong's Restaurant Equipment."

On January 29, 2008, the trial court entered judgment in favor of Maldonado.

c. *Wong unsuccessfully moves for new trial on the grounds of accident and surprise and newly discovered evidence*.

On February 8, 2008, Wong filed a timely notice of intention to move for new trial.

Wong's new trial motion proffered two items of "newly discovered" evidence.

First, after trial, Wong learned the Brave Bull were in fact a corporation, not a partnership. Therefore, "[w]hen [Maldonado] testified he was a partner in the Brave Bull Restaurant so he could testify as to the restaurant's value, he committed perjury."

Second, following the trial, Wong learned "that Exhibit 14 [the purchase agreement between Huiskes and Balderrama] which was not moved into evidence, was of questionable value since it was the subject of a fraud suit by the buyer."

Maldonado filed opposition papers, contending the new trial motion should be denied because Wong failed to present any evidence to establish that Maldonado was insolvent at the time he made the relevant transfers in 1998. Further, even if Wong established the Brave Bull was in fact a corporation, and that Maldonado had no other assets, Maldonado was competent to testify as to the restaurant's value because the partnership between Maldonado and Balderrama owned the corporation.

The trial court did not rule on the motion for new trial. Therefore, the motion was denied by operation of law 60 days after Wong filed notice of intention to move for new trial. (Code Civ. Proc., § 660.)

On May 2, 2008, Wong filed a timely notice of appeal from the judgment. (Cal. Rules of Court, rule 8.108(b).)

CONTENTIONS

Wong does not challenge the sufficiency of the evidence to support the trial court's determination that Maldonado was not insolvent in 1998.

Wong's contention is that the trial court erred in denying the motion for new trial on the grounds of accident and surprise and newly discovered evidence, based on Wong's discovery, after trial, of (1) the corporate status of the Brave Bull restaurant in 1998 when Maldonado transferred property to the family limited partnership; and (2) Huiskes's 1999 lawsuit against Balderrama arising out of the failed buy/sell agreement.

DISCUSSION

1. *Standard of review*.

"We are mindful of the fact that a trial judge is accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great deference on appeal. [Citations.] However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party

(see Code Civ. Proc., § 906), including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.)

2. *No error in denial of motion for new trial*.

a. *Corporate status of Brave Bull did not preclude Maldonado from testifying as to the restaurant's value.*

In an attempt to undermine Maldonado's testimony with respect to the valuation of the Brave Bull restaurant, Wong places heavy emphasis on the belated discovery that Brave Bull was a corporation, not a partnership. The argument is unavailing.

The members of a partnership may own the capital stock of a corporation. (See, e.g., *Stauffer v. Ti Hang Lung & Co.* (1938) 29 Cal.App.2d 121, 124.) Further, partners are competent to testify as to the value of partnership property. (*Vangel v. Vangel* (1953) 116 Cal.App.2d 615, 627.) Therefore, irrespective of the fact Brave Bull was a corporation, because it was an asset of the Maldonado/Balderrama partnership, Maldonado was competent to testify as to the restaurant's value.

b. *Newly discovered evidence that the failed 1999 buy/sell agreement led to a lawsuit was merely cumulative*.

Wong's second argument in support of the motion for new trial was that after trial, Wong learned "that *Exhibit 14* [the purchase agreement between Huiskes and Balderrama] *which was not moved into evidence, was of questionable value* since it was the subject of a fraud suit by the buyer." (Italics added.) Based on our review of the record, this newly discovered evidence of litigation between Huiskes and Balderrama was merely cumulative and would not have led to a more favorable result for Wong.

To reiterate, Maldonado testified at trial that the Brave Bull was worth $4.5 million in 1998. Maldonado based his opinion as to value on a *June 1999* agreement by Balderrama to sell the restaurant to Huiskes for that sum. However, the buy/sell

agreement, Exhibit 14, was not moved into evidence. Maldonado further testified the sale to Huiskes was not consummated.

All these circumstances, namely, (1) the buy/sell agreement between Balderrama and Huiskes was negotiated in 1999 (one year *after* Maldonado created his estate plan), (2) the sale to Huiskes was not consummated; and (3) Exhibit 14 was not admitted into evidence, were known to the trial court and went to the weight it gave to Maldonado's testimony at trial.

Therefore, the newly discovered evidence that the failed buy/sell agreement became the subject of a fraud suit by the buyer was merely cumulative and would not have led to a result more favorable to Wong.

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.